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Facts: Robert Arroyo was employed as a guidance counselor at a high school in Columbia, Maryland. On May 11, 1995, Arroyo was involved in a physical altercation with a teacher at the high school. As a result of the injuries that he suffered, Arroyo did not return to work for the remainder of the school year.

During the summer of 1995, Arroyo was transferred to another high school in Howard County. Allegedly still traumatized by the physical altercation that previous May, Arroyo did not report to work at the high school in August 1995 and continued to remain absent from work even after an independent medical examination of Arroyo was conducted at the behest of the Howard County Public School System ("HCPSS") with the examiner concluding that there was no medical basis for Arroyo to remain absent from work.

In a letter dated March 22, 1996, the superintendent of HCPSS informed Arroyo that if he did not report to work by April 1, 1996, or obtain an approved leave of absence, he would recommend to the Board of Education of Howard County ("County Board") that Arroyo be terminated for neglecting his professional duties. After Arroyo failed to return to work on April 1, 1996, or, in the alternative, obtain an approved leave of absence, the superintendent recommended to the County Board that Arroyo be terminated.

Following an evidentiary hearing conducted by the County Board's hearing examiner, the County Board adopted the hearing examiner's recommendation that Arroyo be terminated and issued a decision, dated January 31, 1997, that stated that Arroyo was to be terminated for "willful neglect of duty" and "insubordination." Arroyo then appealed this decision to the Maryland State Board of Education ("State Board"), which assigned the matter to an administrative law judge (ALJ). After conducting a *de novo* hearing, the ALJ recommended that Arroyo be terminated and the State Board adopted this recommendation in its "opinion," dated May 28, 1998, that concluded that Arroyo was lawfully terminated for "willful neglect of duty."

Arroyo then sought judicial review of the State Board's decision in the Circuit Court for Howard County. After a hearing, the Circuit Court, on April 8, 1999, affirmed the administrative decision of the State Board. Arroyo then filed an appeal to the Court of Special Appeals. On June 14, 2000, the intermediate appellate court affirmed the judgment of the Circuit Court.

On February 8, 2002, Arroyo filed a separate civil complaint against both the County Board and Howard County, Maryland, alleging that he was wrongfully terminated from his employment because of his action of filing a workers' compensation claim. The County Board moved for summary judgment, contending that Arroyo's claim was barred by the statute of limitations. On May 5, 2003, the Circuit Court for Howard County issued a memorandum opinion and order granting the County Board's motion for summary judgment. Arroyo then filed an appeal to the Court of Special Appeals. On February 2, 2004, prior to consideration by the Court of Special Appeals, the Court of Appeals issued a Writ of Certiorari.

Held: Affirmed. The Court of Appeals held that the Education Article of the Maryland Code was meant to give boards of education primary jurisdiction to hear complaints brought by aggrieved educational employees alleging wrongful termination and that the State Board's May 28, 1998 decision affirming Arroyo's termination from his employment with HCPSS was the final decision of an administrative body and constituted an exhaustion of Arroyo's administrative remedies. At this point Arroyo was free to have pursued his separate action in tort alleging wrongful termination and could have filed it even sooner subject to the separate action being stayed during the administrative proceedings. Because Arroyo did not file his claim within three years of May 28, 1998, the point in time when the final administrative decision was made regarding his termination, his separate civil claim was barred by the statute of limitations.

Robert Arroyo v. Board of Education for Howard County. No. 114, September Term, 2003, filed June 10, 2004. Opinion by Cathell, J.

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CRIMINAL LAW — CONFESSIONS — DECLARATIONS BY ACCUSED — *MIRANDA* WARNINGS — STATEMENTS MADE BY A SUSPECT ARE NOT INADMISSIBLE IN EVIDENCE MERELY BECAUSE POLICE DID NOT REPEAT PROPERLY ADMINISTERED *MIRANDA* WARNINGS PREVIOUSLY GIVEN TO A SUSPECT WHEN HE OR SHE WAS NOT IN CUSTODY.

Facts: Appellee, Terrence Tolbert, was indicted for the offenses of first degree murder, armed car jacking, armed robbery and other related offenses. The Circuit Court for Anne Arundel County granted his motion to suppress his inculpatory statements on the grounds that although the police properly advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1996), before he was in custody, they failed to re-advise him of those rights when his status changed from non-custodial to custodial. The State appealed pursuant to Md. Code (1973, 2003 Repl. Vol., 2003 Cum. Supp.) § 12-302(c)(3)(i) of the Courts and Judicial Proceedings Article. The Court of Appeals issued an immediate per curium Order reversing the Order of the Circuit Court and remanded the case for trial. An opinion giving the reasons for that Order followed.

Straughan Lee Griffin, a resident of Annapolis was shot and killed in from of his home on September 19, 2002. Tolbert became a suspect and voluntarily met with the police to discuss a murder; he denied any involvement in the murder. Tolbert submitted to a polygraph examination and went to the Maryland State Police Barracks for that purpose. The police explained the procedure to Tolbert and also advised him of his *Miranda* rights. Tolbert waived those rights and signed a form indicating his waiver. During the test, Tolbert showed signs of deception and his status changed from non-custodial to custodial. He then made several incriminatory statements.

The Circuit Court granted Tolbert's motion to suppress most of his statements on the grounds that the police should have repeated the *Miranda* warnings when his status changed. The court also held that, under the totality of the circumstances, appellee's second and third statements were involuntary.

The State noted a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its initiative prior to consideration by the Court of Special Appeals.

Held: Reversed and remanded for trial. The Court held that the police were not required to re-advise appellee of his *Miranda* rights once he was in custody. The Court noted that it appears to be the almost unanimous view in this country, with the exception of West Virginia, that early, non-custodial *Miranda* warnings may be effective and that re-warnings are not *ipso facto* required when

formal custody attaches. The Court pointed out that when "custody" attaches and when non-custodial questioning becomes "custodial interrogation" is not always easily discernible by the police and that the question should be answered by a consideration of the totality of the circumstances as to whether the defendant, with full knowledge of his or her legal rights, knowingly and intentionally relinquished those rights.

The Court held that the *Miranda* warnings given prior to the polygraph were sufficiently proximate in time and place to custodial status to inform appellee of his privilege against self-incrimination, which *Miranda* was designed to protect. The Court observed that only two hours elapsed between the time appellee signed a *Miranda* waiver form and the time he made his second statement. He made his third statement only about a half hour later. Appellee was continuously in the company of the police, his statements were substantially the same, and his demeanor remained calm and quiet the whole time. The Court found no evidence to suggest that the effectiveness of the early *Miranda* warnings was diminished or that appellee was unaware of his rights.

The Court also held that, under the totality of the circumstances, all of appellee's statements were voluntary. Accepting the Circuit Court's findings that there was no evidence of coercive police tactics, the Court observed that the Circuit Court's ruling was based essentially on the failure of the police to re-advise appellee of his *Miranda* rights once custody attached. The Court concluded that when that factor is not considered, there is absolutely no basis for finding that appellee's statements were involuntary.

State of Maryland v. Terrence Tolbert, No. 83, September Term, 2003, filed June 8, 2004. Opinion by Raker, J.

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EVIDENCE - COLLATERAL SOURCE EVIDENCE IN ACTION UNDER FEDERAL BOILER INSPECTION ACT.

Facts: On March 1, 2000, Francis Haischer was working as a locomotive engineer for CSX Transportation, Inc., (CSX) when he sustained an injury after hitting his shoulder on the back cover of a Head of Train Device (HTD), which had fallen open after the screws holding the HTD door closed had come loose.

Haischer filed suit under the Federal Employer's Liability Act (FELA) and the Boiler Inspection Act (BIA) alleging that (1) the HTD device, and therefore, the locomotive, was defective, (2) he had no knowledge of its defective condition, (3) he relied on information from others as to whether the locomotive was free from defective conditions or hazards, and (4) CSX should have known that the locomotive was unsafe due to the defective condition of the HTD device door. Prior to the commencement of *voir dire*, Haischer withdrew his FELA claim and proceeded solely on the BIA claim. At trial, Haischer moved to preclude CSX from offering evidence of his receipt of Railroad Retirement disability benefits in order to prove malingering. The trial court agreed and precluded CSX from admitting the collateral source evidence. CSX asserted that Haischer, through his own and expert testimony, and by Haischer's counsel's opening statement, "opened the door" for the admission of collateral source evidence. The Court of Special Appeals affirmed the trial court's judgment as to liability, but concluded that the Circuit Court had erred in precluding collateral source evidence offered by CSX. The Court of Appeals granted cross-petitions for *certiorari*.

Held: Reversed. As a matter of State law, evidence of a plaintiff's receipt of Railroad Retirement benefits is ordinarily inadmissible to show possible malingering on the part of the plaintiff. Under the FELA and BIA, there are certain limited exceptions to the inadmissibility of collateral source evidence. One exception is that if the plaintiff claims, in argument or through the introduction of evidence, that he/she is in financial distress due to the injury arising from the railroad's negligence or violation of the BIA and has no other sufficient source of income, evidence that the plaintiff is receiving Railroad Retirement benefits is admissible to rebut that claim. In this case, Haischer's counsel's opening statement and Haischer's testimony that he would be unable to earn a wage comparable to that earned as a railroad engineer, that he would, within a year or two, incur a cost of $6,000 to replace the health insurance supplied by CSX, that he had planned to work until 65 in order to be able to afford to send his son to college, and that he would be unable to maintain his home without employing others to do the kind of maintenance and repairs that he used to do, does not justify the admission of the collateral source evidence.

Francis L. Haischer v. CSX Transportation, Inc., No. 57, September Term, 2003, filed May 7, 2004. Opinion by Wilner, J.

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FAMILY LAW- PROPER PARTY TO CINA PETITION- PATERNITY

Facts: In 2002 the Anne Arundel County Department of Social Services (DSS) filed a CINA petition on behalf of Thomas H., alleging that the appellant, Robert S., had sexually and physically abused the child. Robert had previously been declared Thomas's father by a consent order issued after a 1995 paternity action. That consent order had never been modified. During the 2002 CINA hearings, the child's mother indicated that another man, Roy, was Thomas's father. On that testimony, the master recommended that the parents undergo paternity testing, to which Robert filed exceptions. Meanwhile, the DSS conducted paternity testing with Roy, and those tests revealed a 99.99% probability that Roy was the father. DSS then filed motions to have Roy declared Thomas's father, add him as a party to the CINA petition, remove Robert as a parent and party, and to strike Robert's exceptions on the ground that he was not a father and therefore not a proper party. In November 2002, the court entered an order declaring, among other things, that Robert, pursuant to Maryland Code, Courts & Jud. Proc. §3-801(u)(1),(t), was not the natural parent of Thomas under CINA law and therefore not a proper party to the proceeding. In December, 2002, Robert appealed from that order, but proceedings continued in the Circuit Court. Robert moved to intervene and stay the proceedings, but that motion was denied. After further hearings, the master recommended Thomas be declared a CINA. Robert did nothing to pursue an appeal, but filed exceptions to the denial of the motion to intervene. The Circuit Court then granted permissive intervention and remanded to the master. On remand, the master terminated the intervention because Robert was no longer seeking immediate custody of Thomas. The master again recommended declaring Thomas a CINA. In October, 2003, the master's findings were ratified and an order was signed declaring Thomas a CINA. No appeal was taken from that order.

Held: Appeal dismissed. Appellant failed to perfect the December 2002 appeal as the transcripts were not timely ordered pursuant to Rule 8-411 and the record was not timely transmitted pursuant to Rules 8-202 and 8-412. That appeal was the only one before the court. No appeal was taken from the October 2003 order declaring the child a CINA, and that order is now considered final.

In Re: Thomas H., No. 92, September Term 2003, filed May 10, 2004. Opinion by Wilner, J.

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HEALTH LAW - MEDICAID - MEDICAID CERTIFIED NURSING FACILITY IN A "CONTINUING CARE RETIREMENT COMMUNITY" MUST ADHERE TO MEDICAID NURSING HOME RESIDENT PROTECTIONS OF §19-345 OF THE HEALTH-GENERAL ARTICLE OF THE ANNOTATED CODE OF MARYLAND.

Facts: In November, 2001, Sherwood and Ruth Murphy ("the Murphys") were accepted into Oak Crest Village, a continuing care retirement community (CCRC). Ruth, then 81, was approved for an independent living apartment while Sherwood, then 94, was admitted directly into Oak Crest's nursing home. That nursing home participated in Medicaid, a federal-state sponsored low-income health care program.

To gain admission, the Murphys promised the CCRC that they would not, without the permission of Oak Crest, alienate their assets so as to reduce their net wealth to a level below the CCRC's financial admission standards. Shortly after Sherwood moved into the nursing facility, Ruth Murphy consolidated the couple's joint financial resources and purchased annuities for her own benefit. Sherwood subsequently was accepted into the Medicaid program. Upon learning of this Oak Crest sued Sherwood for breach of contract.

On Sherwood's motion for summary judgment, the Circuit Court for Baltimore County found the anti-alienation clause of the Oak Crest Residence and Care Agreement to be in violation of the Medicaid nursing home resident protections of both §19-345(b) of

the Health-General Article and COMAR 10.07.09.05B(4). The Court of Appeals subsequently granted *certiorari.*

Held: Affirmed. A Medicaid certified nursing facility operating as part of a CCRC is subject to the nursing home resident Medicaid protections of §19-345(b), which preclude a nursing facility admission contract from requiring a resident, as a condition of his stay, to pay as a private pay resident when he is eligible to participate in the Medicaid program. The effect of the anti-alienation provision in this CCRC contract is to preclude the nursing home resident from taking lawful steps to qualify for Medicaid benefits, thereby forcing him to continue as a private pay resident when he might otherwise be lawfully eligible to participate in Medicaid. This effectively violates §19-345(b).

Oak Crest Village, Inc. v. Sherwood R. Murphy, No. 27, September Term, 2003, filed February 9, 2004. Opinion by Wilner, J.

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INSURANCE — DUTY TO DEFEND — EXTRINSIC EVIDENCE — ADVERTISING INJURY — TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO INSURER ON GROUNDS THAT INSURER DID NOT HAVE DUTY TO DEFEND. ALLEGATIONS IN COMPLAINT AND EXTRINSIC EVIDENCE THAT INSURED SOLICITED COMPETITOR'S CLIENTS AND USED COMPETITOR'S CONFIDENTIAL AND PROPRIETARY INFORMATION, INCLUDING BUSINESS AND MARKETING PLANS, DID NOT DEMONSTRATE POTENTIALITY OF COVERAGE UNDER "ADVERTISING INJURY" PROVISION OF INSURED'S POLICY, AND THUS DID NOT TRIGGER INSURER'S DUTY TO DEFEND, WHERE THE POLICY DEFINED "ADVERTISING INJURY" AS INJURY ARISING OUT OF "[C]OPYING, IN YOUR 'ADVERTISEMENT,' A PERSON'S OR ORGANIZATION'S 'ADVERTISING IDEA' OR STYLE OF 'ADVERTISEMENT.'"

Facts: Appellant Richard Walk filed suit against Hartford Casualty Insurance Company alleging that Hartford breached its policy obligation by refusing to defend Walk in a lawsuit filed against him by his former employee, Victor O. Schinnerer & Company, Inc. While employed by Schinnerer, Walk signed several non-

solicitation agreements and a severance agreement in which he promised to safeguard the company's confidential and proprietary information and refrain from soliciting the company's clients for a period of time from the date of termination of employment. After leaving his employment with Schinnerer, Walk became the CEO and President of IBSC East, the East coast marketing arm and new business development coordinator for IBSC, Inc., a California corporation which, like Schinnerer, underwrites liability insurance for professionals. In the underlying lawsuit, Schinnerer alleged that Walk solicited Schinnerer's clients for IBSC's real estate errors and omissions liability insurance program and used Schinnerer's confidential and proprietary information, including its business and marketing plans. The complaint alleged that Walk breached the non-solicitation and severance agreements, violated the Maryland Uniform Trade Secrets Act, breached his fiduciary duty, and engaged in fraud.

Walk was insured under a business insurance policy issued to IBSC East by Hartford. Under the Policy, Hartford agreed to indemnify and defend its insured because of "advertising injury" and to defend any suit seeking such damages. An "advertising injury," as defined by the Policy, included "[c]opying, in your 'advertisement', a person's or organization's 'advertising idea' or style of 'advertisement.'" Hartford refused to defend Walk, finding that none of the plaintiffs' claims implicated the "advertising injury" coverage of the Policy.

Walk settled the underlying suit and then filed the instant action against Hartford for breach of the Policy. The Circuit Court for Howard County granted summary judgment in favor of Hartford, concluding that there was no potential that the plaintiffs in the underlying suit had alleged an "advertising injury." Walk noted an appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own motion prior to consideration by the Court of Special Appeals.

Held: Affirmed. Hartford has a duty to defend its insured for all claims that are potentially covered under the policy. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 408, 347 A.2d 842, 850 (1975). If the complaint in the underlying suit neither conclusively establishes nor negates a potentiality of coverage, an insured may establish potentiality of coverage through extrinsic evidence which demonstrates "a reasonable potential that the issue triggering coverage will be generated at trial." *Aetna v. Cochran*, 337 Md. 98, 112, 651 A.2d 859, 866 (1995). Finding that the complaint did not trigger a duty to defend, the court evaluated extrinsic evidence which included Walk's deposition testimony, Schinnerer's answers to interrogatories, and a settlement demand

letter from Schinnerer's counsel.

The Court held that neither the complaint nor the extrinsic evidence showed that the underlying plaintiffs claimed an advertising injury because the plaintiffs never alleged that Walk copied any of Schinnerer's advertising ideas or styles in an advertisement. The court concluded that the crux of the underlying allegations was Walk's alleged breach of the non-competition agreements and that Schinnerer, in its settlement demand letter, interrogatories, and discovery, necessarily referred to advertising activity by Walk to prove that he solicited the company's clients. The Court held that, even assuming Walk's actions could have supported a claim of "advertising injury" by a hypothetical plaintiff, the plaintiffs never asserted such a claim and there was no reasonable potential that such a claim would have been generated at trial. Hartford had no duty to defend Walk because there was no potentiality of coverage for an "advertising injury" as that term was defined by the Policy.

Richard J. Walk v. Hartford Casualty Insurance Company, No. 110, September Term, 2003, filed June 16, 2004. Opinion by Raker, J.

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COURT OF SPECIAL APPEALS

CIVIL PROCEDURE - JUDICIAL ESTOPPEL - WHEN APPLICABLE. CONTRACT INTERPRETATION – LANDLORD AND TENANT LAW - TERMINATION OF LEASE UNDER AUTOMATIC TERMINATION CLAUSE - WORDS OF CONTRACT TO BE INTERPRETED TO AVOID ABSURD RESULTS.

Facts: Optim Electronics Corporation occupied premises under a lease agreement with Middlebrook Tech, LLC , the appellant. The lease agreement contained a "bankruptcy termination provision" providing that the lease would automatically terminate upon the happening of specific events having to do with the tenant becoming financially unstable. On December 7, 1999, the appellee, Roger Moore, president of Optim, executed a written "Unconditional Guaranty Agreement" in which he personally guaranteed, to Middlebrook, payment of all rent, and the observance and performance of all the terms of the lease. On December 9, 1999, Optim's parent company, Trident, a British company, entered into a loan agreement with the Bank of Scotland (the BOS). Trident pledged all of Optim's assets as security for the BOS loan. Eventually, Trident defaulted on the BOS loan, and on August 30, 2001, it was forced into "administrative receivership" in the United Kingdom.

On February 8, 2002, upon the petition of Moore and other Optim employees, Optim was placed in involuntary bankruptcy under Chapter 7 of the federal bankruptcy code. Thereafter, Middlebrook filed a motion in the bankruptcy court for relief from the automatic stay. It argued that the lease ended on April 30, 2002, was not renewed, and that Optim had held-over its tenancy. It also argued that even if the lease was renewed, it was deemed rejected by the trustee, and therefore Middlebrook was entitled to immediate possession of the premises. The bankruptcy court entered an order granting Middlebrook's motion, and stated that the lease was deemed rejected.

On February 4, 2003, in circuit court, Middlebrook sued Moore for breach of guaranty. Middlebrook alleged that Optim renewed the lease but then breached by failing to pay rent, and that as gaurantor, Moore was liable. Moore argued, *inter alia*, that the lease had automatically terminated before the renewal term, by one of two events. Either the lease terminated when, by pledging its assets as collateral for the BOS loan to Trident, Optim made an assignment of all or a substantial part of its property for the benefit of its creditors or that the lease terminated automatically when the administrators were appointed. Moore countered that

automatic termination of the lease meant the obligations he had guaranteed no longer existed and that as such he was not liable for back rent.

On cross motions for summary judgment, the court ruled for Moore, on the grounds of judicial estoppel, because Middlebrook had relied on the automatic termination provision clause in the bankruptcy proceeding, and therefore could not argue to the contrary in the surety action.

Held: Reversed and remanded for further proceedings not inconsistent with the opinion of the Court of Special Appeals. Judicial estoppel applies when a position advocated by a party in an earlier matter is accepted by the court in that matter. Here, the bankruptcy court did not address the issue whether the Lease was terminated pre-petition, let alone accept that position. No one actually raised the issue before the bankruptcy court, and because it was not raised, the circuit court's order, finding that the trustee was deemed to have rejected the Lease under the bankruptcy code, implicitly was at odds with a finding that the Lease had terminated before the bankruptcy petition was filed. As the provision of the bankruptcy code allowing the trustee to reject a lease applies only to unexpired leases, if the lease was terminated before the bankruptcy petition was filed, it was an expired lease, and therefore would not have been deemed rejected by the Bankruptcy Court.

Furthermore, the court held that an "automatic termination" clause in a lease (or any limitation on a leasehold estate) that is wholly for the benefit of one party cannot reasonably be interpreted as self-executing, i.e., to result in an automatic termination of the lease upon the happening of a certain event even when the party to be benefitted by the termination clause does not know that the event has happened and does not signify an intention to terminate the lease. Otherwise, the party who is not meant to benefit from the clause could take improper advantage under it. The court will not interpret the termination clause in the lease to produce such an absurd result. Thus, the automatic termination clause intended to benefit Middlebrook by protecting its interest in dealing with a financially viable tenant did not cause the lease to terminate when Optim pledged its assets or when its parent company went into receivership in Great Britain, events not known to Middlebrook, and in the absence of any signification by Middlebrook of its intention that the lease should end.

Middlebrook Tech, LLC v. Roger H. Moore, No. 1104, September Term 2003, filed May 7, 2004. Opinion by Eyler, Deborah S., J.

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CRIMINAL LAW - DEFENDANT'S PAYMENT OF DNA EXPERT'S FEES - MD. ANNOTATED CODE, ART. 27, §§ 2 AND 7(A); MD. ANNOTATED CODE, ART. 27A, §§1, 3 AND 6(F); *AKE v. OKLAHOMA*, 470 U.S. 68 (1985); *JOHNSON v. STATE*, 292 MD. 405 (1982); PUBLIC DEFENDER STATUTE; APPELLANT WHO WAS REPRESENTED BY PRIVATELY RETAINED COUNSEL COULD NOT REQUIRE THAT OFFICE OF PUBLIC DEFENDER PAY FOR DNA EXPERT TO TESTIFY WHEN DNA EXPERT HAD SUBMITTED TO APPELLANT A PRELIMINARY OPINION REGARDING TESTING METHODS USED BY STATE'S DNA EXPERT ON BLOOD FOUND ON ITEMS COLLECTED FROM THE SCENE OF THE CRIME; INDIGENCY SHOULD BE DETERMINED BY THE PUBLIC DEFENDER AND ANCILLARY SERVICES ARE PROVIDED IN CONJUNCTION WITH REPRESENTATION BY THE OFFICE OF THE PUBLIC DEFENDER.

Facts: Frederick James Moore, appellant, was charged with first degree murder in an indictment filed on January 4, 2001, in the Circuit Court for Howard County. Appellant did not seek representation through the Public Defender but retained private counsel for his defense. On March 7, 2001, the State filed a notice of its intention to introduce Deoxyribonucleic Acid (DNA) profile evidence at trial. In response, appellant hired a DNA expert, who provided him with a preliminary analysis of the State's DNA evidence. Appellant's expert, however, would not testify at trial without additional payment. Unable to provide further funding for the expert, appellant filed a motion on November 20, 2001, requesting that the Public Defender or Howard County provide financial aid for the testimony of his DNA expert. Despite his retention of private counsel, appellant claimed he was indigent although he made no factual showing of his indigency.

On January 14, 2002, a hearing was conducted regarding appellant's request. The Public Defender stated that it was the policy not to provide expert witness funding for defendants represented by private counsel. Also, the circuit court noted that there was no funding in its budget to finance the testimony of appellant's expert. Consequently, the trial court denied appellant's motion, thereby refusing to supply funding from its budget and refusing to order the Public Defender to furnish expert witness funding.

Held: Affirmed. Under the Public Defender Statute, Maryland Code (1957, Repl. 1997), art. 27A, "indigent" is defined as a defendant unable to provide for the full payment "of an attorney" and "all other necessary expenses of legal representation." The enactment is unified, in that a defendant cannot be indigent for one purpose, such as "all other necessary services" and yet be capable of making payment for another purpose, such as retaining private counsel. In other words, the inability to retain counsel is not severable from the inability to obtain the necessary

services associated with legal representation. Accordingly, funding for necessary services – like those provided by an expert witness – is conditioned upon representation by the Public Defender. Appellant retained private counsel and thus was not eligible for State funding to pay his expert witness.

Additionally, the circuit court may not order the Public Defender to provide expert witness funding. The Public Defender's Office is within the executive branch and whether services will be provided is entirely within its discretion. Furthermore, the court is not required under the Public Defender Statute to supply such funding.

Frederick James Moore v. State of Maryland, No. 1394, September Term, 2002, decided January 28, 2004. Opinion by Davis, J.

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CRIMINAL LAW - HEARSAY EVIDENCE AT PROBATION REVOCATION HEARING - MD. RULE 4-347; *STATE v. FULLER*, 308 MD. 547 (1987); *BAILEY v. STATE*, 327 MD. 689 (1992); REQUIREMENT THAT REASONABLY RELIABLE HEARSAY MUST BE TESTED AGAINST THE FORMAL RULES OF EVIDENCE TO DETERMINE IF IT FITS INTO AN EXCEPTION AND MAY BE RECEIVED WITHOUT A FINDING OF GOOD CAUSE UNLESS IT RUNS AFOUL OF RULES OF EVIDENCE APPLICABLE TO REVOCATION PROCEEDINGS OR THE CONFRONTATION CLAUSE. WHEN EVIDENCE RUNS AFOUL OF CONFRONTATION CLAUSE, IT MUST SATISFY STANDARD OF REASONABLE RELIABILITY AND TRIAL JUDGE MUST STATE, *ON THE RECORD*, A SPECIFIC FINDING OF GOOD CAUSE. TRIAL JUDGE ERRED IN FAILING TO REQUIRE THE STATE TO OFFER AN EXPLANATION AS TO WHY TWO ESSENTIAL WITNESSES WERE UNAVAILABLE TO TESTIFY IN PERSON AT PROBATION REVOCATION HEARING AND IN NOT MAKING A FINDING ON THE RECORD OF GOOD CAUSE TO DISPENSE WITH THEIR LIVE TESTIMONY.

Facts: Tiara Cardell Thompson, appellant, pled guilty to second degree assault on August 6, 1999 and was sentenced to a term of eight years' imprisonment with all but 198 days suspended and placed on probation for one year after his incarceration. While on

probation, he was charged with multiple offenses stemming from the murder of Clifford Bell. Appellant's first trial resulted in a conviction for second degree murder and use of a handgun in the commission of a felony or a crime of violence. On direct appeal, the case was remanded to the trial court and, on remand, the trial court reversed appellant's conviction. Appellant's second trial on the charges resulted in an acquittal. On May 3, 2002, appellant appeared for a probation revocation hearing. At the hearing, the State claimed that appellant violated the terms of his probation because of his involvement in the murder of Bell. To support its case, the State produced transcripts of Joseph Montgomery and Renee Beaty, both of whom were witnesses in appellant's previous trials. Over defense counsel's objection, the trial judge admitted the transcripts into evidence. The trial judge found that appellant had violated his probation by failing to obey all laws and imposed the eight-year sentence of incarceration with credit for two years and 335 days for time already served.

Held: Reversed. The trial judge erred by failing to state on the record findings regarding the reasonable reliability of the testimony of Montgomery and Beaty contained in the record transcript and whether good cause existed to admit the transcripts in lieu of their live testimony. In *Fuller v. State*, 308 Md. 547 (1987), the Court of Appeals established the rule that, when hearsay evidence offered at a probation revocation hearing violates the rules of evidence or the Confrontation Clause, the offered evidence is admissible only if it is reasonably reliable and good cause exists to dispense with live testimony. The Court of Appeals elaborated on this rule in *Bailey v. State*, 327 Md. 689 (1992) by emphasizing the importance of the reasonable reliability requirement. Contrary to the State's argument on appeal, *Bailey* did not undermine or modify the second requirement that the trial judge make a specific finding of good cause to dispense with live testimony. The holdings of *Fuller* and *Bailey* work in conjunction with one another to ensure that, despite the informal nature of probation revocation hearings, a defendant's right to confront adverse witnesses is sufficiently protected.

Tiara Cardell Thompson v. State of Maryland, No. 1065, September Term, 2002, decided April 8, 2004. Opinion by Davis, J.

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CRIMINAL LAW - SEARCH WARRANTS - ILLINOIS v. GATES, 462 U.S. 213 (1983); *McDONALD v. STATE*, 347 MD. 452 (1997) AFFIDAVIT WAS NOT SO DEFICIENT AS TO CONSTITUTE A "BARE BONES" AFFIDAVIT OR TO INDICATE OFFICERS ACTED IN BAD FAITH IN EXECUTING SEARCH WARRANT, AND, THEREFORE, THE GOOD FAITH EXCEPTION ANNOUNCED IN *UNITED STATES v. LEON*, 468 U.S. 897 (1984), WAS APPLICABLE, THEREBY RENDERING THE EVIDENCE ADMISSIBLE.

Facts: On November 20, 2001, an officer of the Baltimore City Police Department obtained a search warrant for the residence and vehicle of appellant Harold Ferguson. Police executed the warrant on the same day and uncovered various items of contraband from appellant's residence, including two handguns and 531 gel caps of heroin. Appellant was subsequently indicted in the Circuit Court for Baltimore City on December 5, 2001, and charged with three counts of conspiracy to distribute and/or possess a controlled dangerous substance (CDS). On January 30, 2002, appellant was also charged by indictment in the Circuit Court for Baltimore County with possession with intent to distribute a CDS and possession of a CDS. Appellant filed motions to suppress evidence in both venues on January 22, 2002 and March 8, 2002, alleging that the search warrant lacked probable cause. A suppression hearing was conducted in the Circuit Court for Baltimore City on October 3, 2002, and appellant's motion was denied on October 10, 2002. Subsequently, appellant was found guilty of the charges in both venues and sentenced to two concurrent terms of fifteen years' imprisonment, with all but years suspended.

Held: Without deciding whether probable cause was lacking but, instead, turning immediately to the good faith exception provided in *United States v. Leon*, 468 U.S. 897 (1984), it is evident that the search warrant passed constitutional muster and, therefore, appellant's motion to suppress was properly denied. More specifically, none of the four exceptions to the application of the *Leon* good faith exception were applicable: 1) appellant did not allege that the issuing magistrate was mislead by the supporting affidavit, 2) there was no indication that the issuing magistrate participated in the police operation, thereby abandoning her neutral and detached judicial role, 3) the supporting affidavit was not so lacking in probable cause or "bare bones" in nature that the applying officer was unable to claim objective good faith in relying on the search warrant, and 4) the supporting affidavit was not so facially deficient that the executing officers could not reasonably presume it was valid.

Harold Ferguson v. State of Maryland, No. 2981 and No. 2895, September Term, 2002, decided July 15, 2004. Opinion by Davis, J.

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FAMILY LAW - DIVORCE - DETERMINING WHETHER INCREASE IN THE VALUE OF A STOCK PORTFOLIO CONSTITUTES MARITAL PROPERTY

Facts: Husband, Mukut K. Dave, and Wife, Susan E. Steinmuller, were married in 1985. Dave was born in India and held a bachelor's degree in electrical engineering and a master's degree in business administration (MBA). In India, he was employed as a media planner, manager, and director in advertising agencies, and worked in advertising the United States.

Steinmuller was employed by the City of Baltimore through 1991, when she retired. Unable to retain an advertising job after his termination, in 1987, the parties agreed Dave would manage Steinmuller's investment portfolios, and Dave testified that he approached this management as full-time employment, and dedicated an average of 30 hours each week to the task. Steinmuller had a premarital account that moved from several brokerage firms by the end of the marriage, and an account which contained a premarital inheritance. Though Steinmuller authorized Dave to trade, the largest account remained in the sole name of Steinmuller. The parties enjoyed a high standard of living, and Dave ceased management of the account in 2001 when the parties separated.

The parties were divorced by judgment of the Circuit Court for Baltimore County, and appellant Husband sought to enhance his substantial monetary award and alimony allowance, finding error in the trial court's fiscal determinations. Husband sought review of the circuit court's orders for the equal division of the parties' joint brokerage account and the determination that the parties' Legg Mason securities account was not marital property. Husband also found fault with the court's failure to award indefinite alimony, and the amount of attorneys' fees awarded.

Held: Affirmed. A spouse who owns nonmarital property is permitted to preserve its nonmarital status even if it changes in character or form during the marriage, as long as the spouse can trace the asset acquired during marriage directly to a nonmarital source. Beyond showing that one has devoted considerable time to the portfolio management, one must be able to provide sufficient probative evidence of how his or her efforts resulted in the increase in value of the portfolio. If there was not sufficient evidence from which the trial court could have quantified what portion of the appreciation was the result of a spouse's efforts, as opposed to other factors, the trial court may not speculate.

Dave v. Steinmuller, No. 1212, Sept. Term, 2003, filed July 15, 2004. Opinion by Sharer, J.

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FAMILY LAW - PATERNITY - FAMILY LAW § 5-1029 PROVIDES THAT, IF A PARTY REQUESTING A PATERNITY TEST IS INDIGENT, THE COSTS OF THE TEST SHALL BE BORNE BY THE COUNTY IN WHICH THE PROCEEDING IS PENDING. WHEN A REQUEST IS MADE PURSUANT TO THIS PROVISION, THE COURT SHALL MAKE A FINDING WITH RESPECT TO INDIGENCY AND EXPLAIN ITS FINDING.

Facts: In February, 1991, as part of a consent paternity decree entered by the Circuit Court for Baltimore City, Timothy Wiggins, appellant, was ordered to pay child support for a minor child born to Terri Griner, appellee.

On February 11, 2002, appellant filed a motion to modify his child support payments, requesting paternity testing of the parties and asking the trial court to modify his payments accordingly. Appellant indicated in the financial statement attached to his motion that he had no income at the time of filing.

On July 19, 2002, a Master's hearing was held on appellant's motion. The trial court ordered the testing, but required appellant to pay for the testing "up front."

As he was unable to pay for the testing, appellant filed a motion for waiver of paternity testing costs on November 14, 2002, pursuant to Md. Code (1974, 1999 Repl. Vol.), § 5-1029(h)(2) of the Family Law Article. Section 5-1029(h)(2) provides that, "[i]f any party chargeable with the cost of the blood or genetic test . . . is indigent, the cost of the blood or genetic test shall be borne by the county where the proceeding is pending . . .," in this case, Baltimore City. Appellant attached a request for waiver of prepayment to his motion for waiver, stating that he was indigent.

On November 21, 2002, the trial court denied appellant's motion for waiver, stating only that "insufficient information" was supplied. Thereafter, appellant filed a Motion for revision of denial of waiver on February 4, 2003, stating again that he was indigent, and requesting that costs be waived and a hearing be held on the issue. On February 5, 2003, the court denied this motion without holding a hearing.

Held: The circuit court's holding must be vacated because the court erred in failing to make any factual findings with respect to appellant's indigency.

From the outset, the Court noted that although appellant was declared the father of appellee's child through a consent decree in 1991, Maryland law clearly provides that a declaration of paternity may be modified or set aside if a blood test establishes that the

person is not the father of the child. Therefore, the fact that appellant was initially established as the father of appellee's child does not now preclude him from challenging that declaration and requesting genetic testing.

The Court then discussed the language of Section 5-1029, noting that it clearly provides that, *if* a person is indigent, the costs of genetic testing *shall* be borne by the county where the proceeding is pending. The Court found that the circuit court denied appellant's motion without making evidentiary findings sufficient to permit appellate review with respect to whether appellant is indigent.

The Court held that the circuit court should have clearly indicated whether it determined that appellant was indigent and explained its findings. Therefore, the Court vacated the circuit court's denial of appellant's motion and remanded for a determination of appellant's indigency.

Timothy Wiggins v. Teri Griner, No. 10, September Term, 2003, filed March 5, 2004. Opinion by Eyler, James R., J.

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FAMILY LAW - PRE-NUPTIAL AGREEMENTS - *FREY v. FREY*, 298 MD. 552 (1984), *HARTZ v. HARTZ*, 248 MD. 47 (1967), AND *HARBOM v. HARBOM*, 134 MD. APP. 430 (2000); VALIDITY OF ANTENUPTIAL AGREEMENTS; FRANK, FULL, AND TRUTHFUL DISCLOSURE OR ACTUAL KNOWLEDGE OF WHAT IS BEING RELINQUISHED AND KNOWLEDGE THAT INSTRUMENT EFFECTUATES SUCH RELINQUISHMENT IS KEY WHICH TURNS THE LOCK LEADING TO IMPREGNABLE VALIDITY RENDERING HARSH RESULT AN INCONSEQUENTIAL FACTOR; CONFIDENTIAL RELATIONSHIP; DOMINANT POSITION OF HUSBAND OVER WIFE NO LONGER PRESUMPTION RECOGNIZED DUE TO MARYLAND DECLARATION OF RIGHTS, ART. 46, THEREBY REQUIRING THAT CONFIDENTIAL RELATIONSHIP BE ESTABLISHED AS A FACTUAL DETERMINATION INSTEAD OF RESTING ON A PRESUMPTION; FRAUD IN THE INDUCEMENT; WHEN FRAUD IN THE INDUCEMENT IS BASED ON PROMISE TO PERFORM IN THE FUTURE, CLAIM MUST ESTABLISH THAT INTENTION NOT TO PERFORM IN THE FUTURE EXISTED AT THE TIME OF

THE ALLEGED INDUCEMENT; "STRONG EVIDENCE" OF A PRESENT INTENTION NOT TO PERFORM IN THE FUTURE IS WHEN A SHORT TIME ELAPSES WITH NO CHANGE IN CIRCUMSTANCES WHEN FAILURE TO PERFORM OCCURS; IN INSTANT CASE, TRIAL COURT ERRED IN SETTING ASIDE ANTENUPTIAL AGREEMENT IN LIGHT OF FACTUAL FINDINGS, REGARDING FACTORS TO SUPPORT VALIDITY, WHICH DID NOT SUPPORT INVALIDITY OF AGREEMENT; ALTHOUGH TRIAL JUDGE DID NOT MAKE FACTUAL FINDING REGARDING APPELLEE'S CLAIM OF FRAUD IN THE INDUCEMENT, PERIOD FROM MAY 27, 1994 TO FEBRUARY 1996 DURING WHICH THE RELATIONSHIP BETWEEN THE PARTIES DETERIORATED IS EVIDENCE NEGATING THE ASSERTION THAT APPELLANT HARBORED EXISTING INTENTION NOT TO PERFORM IN THE FUTURE AND THEREFORE WIFE'S CLAIM OF FRAUD IN THE INDUCEMENT FAILS; TRIAL JUDGE ERRED IN FINDING EXISTENCE OF ORAL AGREEMENT WHEN THERE WAS NO EVIDENCE THAT APPELLANT MADE PROMISE TO RESCIND ANTENUPTIAL AGREEMENT IN THE FUTURE.

Facts: John A. Cannon, appellant, and Wendy J. Cannon, appellee, were married on June 25, 1995. Prior to the marriage, they signed a Pre-Nuptial Agreement (Agreement) on May 27, 1994. At the time the Agreement was executed, appellant informed appellee that the Agreement was necessary to protect his assets from appellee's bankruptcy creditors. By the terms of the Agreement, the parties agreed to retain sole title to any assets acquired before or during the marriage and, likewise, any debts incurred prior to or during the marriage would remain the debt of the party who had incurred it. Appellant and appellee additionally agreed to waive their respective rights to a monetary award, alimony, and retirement benefits in the event of a divorce.

The parties separated in 2001 and appellee subsequently filed a Complaint for Absolute Divorce (Complaint) in the Circuit Court for Frederick County on July 3, 2002. In her Complaint, appellee sought to invalidate the Agreement and assert claims for her share of the marital estate and monetary support from appellant. After appellant filed a response, a hearing was held on March 26, 2003 to determine the validity of the Agreement. In an oral opinion, the trial judge concluded that the Agreement was invalid because, at the time the Agreement was executed, appellant orally promised that it would terminate upon the cessation of appellee's bankruptcy proceedings.

Held: Reversed. The trial judge erred in his factual finding that the evidence established that appellant made an oral promise to set aside the Agreement while, at the same time, the trial judge found that the factors enunciated in *Frey v. Frey*, 298 Md. 552 (1984), and *Hartz v. Hartz*, 248 Md. 47 (1967), weighed in favor of the validity of the Agreement.

A pre-nuptial agreement is a contract and, thus, is subject to

the general rules of contract interpretation. *Herget v. Herget*, 319 Md. 416 (1990). According to the objective law of contracts, a trial court is required to review the language of the contract and, if it is unambiguous, extrinsic evidence may not be admitted to interpret the contract. Here, both parties agree that there is no express term that terminates the Agreement in the future upon appellee's emergence from bankruptcy. To the contrary, it is unambiguous that the Agreement, by its terms, contemplates termination upon the dissolution of the marriage. Moreover, there was no evidence upon which the trial court could conclude that appellant had promised that the Agreement would expire at some point in the future. Appellee's subjective belief, without evidence of an actual promise made by appellant, was insufficient to show that a side oral agreement existed.

Frey v. Frey, 298 Md. 552 (1984), established a five-part test to determine the validity of a pre-nuptial agreement: (1) made a full and frank disclosure to each other about their respective assets and liabilities, (2) had full knowledge of the effect of the Agreement, and (3) understood the importance of and had the opportunity to obtain independent legal advice. Additionally, the trial court was incorrect when it found that the Agreement was not fair in its procurement or result. The mere fact that a spouse agrees to relinquish all of his or her rights in the other spouse's estate is not enough to set aside a pre-nuptial agreement. *Martin v. Farber*, 68 Md. App. 137, 144-45 (1968).

Although the trial judge failed to address the issue, appellee's fraud in the inducement claim also fails nonetheless. Even if there had been evidence in the record that appellant promised to terminate the Agreement when appellee emerged from bankruptcy, the essential predicate, a promise to perform a future act, cannot form the basis of a fraud in the inducement claim. *First Union Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 149 (2003). Therefore, had appellant made such a promise, appellee's claim for fraud in the inducement would fail.

John A. Cannon v. Wendy J. Cannon, No. 295, September Term, 2003, decided April 15, 2004. Opinion by Davis, J.

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TORTS - FIREMAN'S RULE - DISTINGUISHING *TUCKER v. SHOEMAKE*, 354 MD. 413 (1999) AND *RIVAS v. OXON HILL JOINT VENTURE*, 130 MD. APP. 101 (2000) - APPELLEE FIREFIGHTER WAS INJURED DURING PERIOD OF ANTICIPATED OCCUPATIONAL RISK AND OPEN STAIRWELL DID NOT CONSTITUTE "HIDDEN" DANGER IMPOSING ON OWNER OF MOTEL A DUTY TO WARN; *FLOWERS v. ROCK CREEK LTD. PARTNERSHIP*, 308 MD. 432 (1987) - OPEN STAIRWELL DID NOT CONSTITUTE NEGLIGENCE THAT WAS INDEPENDENT OF THE REASON FOR WHICH APPELLEE WAS SUMMONED TO THE PREMISES.

Facts: Appellee, a Baltimore County firefighter, responded at approximately 4:30 A.M., on January 25, 2000 to a fire at the Regal Inn Motel which was owned and operated by appellant. In an attempt to proceed from the first level to the second level of the motel to reach motel guests trapped by the fire, appellee fell down an open stairwell which was imperceptible because of low visibility caused by the smoke. The trial judge denied appellant's motion for summary judgment and motion for judgment, ruling that whether there was a "nexus" between the smoke and appellee's fall was a question for the jury. The jury returned an award of $454,396.43 in favor of appellee.

Held: Affirmed. Judgment Reversed. The Court held that, pursuant to the decision of the Court of Appeals in *Tucker v. Shoemake*, 354 Md. 413 (1999) and the Court of Special Appeals in *Rivas v. Oxon Hill Joint Venture*, 130 Md. App. 101 (2000), the fireman's rule precluded recovery by appellee because his injury occurred "during a period of anticipated occupational risk" and was not independent of the reason for which appellee was at the motel to render his service as a firefighter. Furthermore, open stairwell did not constitute a "hidden danger," imposing upon appellant a duty to warn as the risk was not concealed or deceptive in appearance, "something like fraud put in the path of the plaintiff, as would render the danger a trap." Citing *Flowers v. Rock Creek Limited Partnership*, 308 Md. 432 (1987).

Shastri Narayan Swaroop, Inc. v. Jonathan D. Hart, et ux., No. 226, September Term, 2003, decided July 19, 2004. Opinion by Davis, J.

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TORTS – EMPLOYER LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR – LIABILITY OF EMPLOYER FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR; EXCEPTIONS TO RESTATEMENT OF TORTS 2ND, CHAPTER 15, PRECLUSION OF LIABILITY; §§ 410-415 RE ACTUAL FAULT OF EMPLOYER OF INDEPENDENT CONTRACTOR; §§ 416-429 RE VICARIOUS LIABILITY OF EMPLOYER; BECAUSE EXCEPTIONS PROVIDED IN §§ 410, 413 AND 416-429 WERE NOT RAISED IN OR DECIDED BY THE TRIAL COURT, APPELLANT'S ASSIGNMENT OF ERROR WAS NOT PRESERVED, MD. RULE 8-131(a); SAFETY PROCEDURES UNDER GENERAL CONTRACT DID NOT GRANT APPELLEE THE "RIGHT TO CONTROL THE DETAILS OF THE [CONTRACTORS'] MOVEMENTS DURING [THEIR] PERFORMANCE OF THE BUSINESS AGREED UPON" PURSUANT TO § 414"; APPELLEE WAS NOT LIABLE UNDER § 343 ("SAFE WORKPLACE" DOCTRINE) BECAUSE IT DID NOT "CONTROL THE DETAILS AND MANNER IN WHICH THE WORK IS TO BE ACCOMPLISHED," *LeVONAS v. ACME PAPER BOARD CO.*, 184 MD. 16, 20 (1984), AND THE ASBESTOS DID NOT CONSTITUTE A LATENT OR CONCEALED DANGER WHICH PRE-EXISTED INDEPENDENT CONTRACTOR'S CONTROL OF THE SUBJECT PREMISES.

Facts: Anthony A. Wajer, appellant, is a retired general electrician suffering from mesothelioma, a form of cancer often associated with asbestos exposure. According to appellant, he was exposed to asbestos inhalation while working at three power plant construction projects on property owned by appellee Baltimore Gas and Electric Company. Although appellant was employed by an independent contractor during each project, he claimed that appellee was subject to premises liability because it exercised control over the projects and because it possessed sufficient knowledge of the asbestos hazards. Accordingly, appellant filed a negligence action on July 25, 2001, in which appellee was identified as one of twenty-nine other defendants. In response, appellee filed a motion for summary judgment on April 7, 2003, arguing that it owed no duty to appellant because he was an employee of an independent contractor when the injuries occurred. The trial court granted the motion for summary judgment on May 16, 2003, holding that a landowner such as appellee owes no duty to appellant – the employee of an independent contractor – because to do so would "end run" around the workers' compensation law.

Held: Affirmed. Although appellant raised on appeal arguments under the various exceptions to the general rule contained in Chapter 15 of the Restatement (Second) of Torts, which states that the employer of an independent contractor is not liable for the negligence of the contractor or his or her employees, he had not raised the exceptions contained in §§ 410, 413, and 416-429 of the Restatement in the circuit court and, consequently, he failed to preserve those exceptions for review under Md. Rule 8-131(a). Appellant also failed to demonstrate that appellee retained operative control over the independent contractors' work and, therefore, he could not invoke the exception set forth in § 414.

Finally, appellant was unable to utilize the safe work place doctrine enunciated in § 343 because of appellee's lack of operative control over the work sites and because the dangerous condition – the asbestos – was the work product of the independent contractors and, thus, did not exist when the independent contractors took control of the premises.

Anthony A. Wajer, et ux. v. Baltimore Gas and Electric Company, No. 697, September Term, 2003, decided June 4, 2004. Opinion by Davis, J.

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TORTS - FALSE IMPRISONMENT - FALSE ARREST - MALICIOUS PROSECUTION - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, EXCESSIVE FORCE, ASSAULT AND BATTERY - MOTION TO DISMISS, SUMMARY JUDGMENT, QUALIFIED IMMUNITY; CIRCUIT COURT ERRED IN DENYING MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT AS TO ARRESTING OFFICER ALLEGED TO HAVE GRABBED APPELLANT AND THROWN HER AGAINST THE SIDE OF HER TRUCK, THEN SLAMMED HER FACE AGAINST THE TRUCK, WHILE LAUGHING AND COMMENTING "THAT MUST HAVE REALLY HURT"; CIRCUIT COURT PROPERLY GRANTED MOTION TO DISMISS OR SUMMARY JUDGMENT AS TO 911 OPERATOR WHO ERRONEOUSLY DISPATCHED INFORMATION THAT VEHICLE WITH APPELLANT'S LICENSE NUMBER HAD BEEN INVOLVED IN A HIT-AND-RUN ACCIDENT, AS TO DESK CLERK WHO DECLINED TO ACCEPT REPORT OF POLICE ABUSE, AS TO SUPERIORS OF ARRESTING OFFICER FOR VICARIOUS LIABILITY, AND AS TO THE STATE OF MARYLAND AND LOCAL SUBDIVISION.

Facts: A motorist was stopped by Harford County Deputy Sheriff who, because her license plate number had been broadcast by a 911 dispatcher, erroneously believed she had been involved in a hit and run automobile accident. The motorist asserted that the Deputy Sheriff, after ordering her out of her truck, slammed her face, where she had recently undergone surgery on her right jaw, into the side of her truck and, while laughing, remarked that it "must have really hurt." The motorist filed suit against the Deputy Sheriff, his supervisor - the Chief of Police, the Harford County Sheriff's

Department, Harford County, the Harford County 911 dispatcher, a Harford County Sergeant who allegedly refused to accept a claim of police abuse, the Baltimore County Police Department and Baltimore County alleging assault, battery, false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, negligence and loss of consortium. The defendants filed motions to dismiss or for summary judgment. The trial judge granted the motion to dismiss as to assault because of the one-year statute of limitations. The motions to dismiss or for summary judgment were granted as to the remaining claims on the basis that the defendants were entitled to claim qualified immunity.

Held: The motorist failed to state a cause of action for intentional infliction of emotional distress as to any of the defendants because none of the conduct alleged was so extreme and outrageous as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. The claim of negligence against the 911 dispatcher (Jane Doe) was properly dismissed because she never affirmatively acted to protect or assist the appellant, thereby inducing specific reliance on the dispatcher in order for there to be a special relationship between her and appellant. The claim of negligence against the Sergeant who refused to take appellant's complaint of police abuse was properly dismissed because "a breach of a duty which is his job, rather than his responsibility as a member of the public" are better handled in disciplinary proceedings or criminal prosecution for dereliction of duty, particularly when there are no identifiable damages to complainant. Although claims of battery, false arrest and false imprisonment were properly dismissed because the Deputy Sheriff had a right to arrest appellant based on the information he received to the effect that appellant had been involved in a hit and run accident, the trial court erred in granting the motion to dismiss malicious prosecution claim because the trier of fact could believe appellant's assertion that there had been no violation of traffic laws and that prosecution of the claim was for the purpose of insulating the deputy from liability. Trial court erred in granting the motion for summary judgment as to excessive force claim because appellant alleged use of force which exceeded that necessary to effectuate arrest and allegations, if sustained, establish malicious intent. Finally, the motions for summary judgment as to the remaining defendants were properly granted because the defendant governmental entities and public officials not alleged to have acted with malice were entitled, either directly or derivatively, to qualified immunity.

Mary Ann Hines, et vir v. John French, et al., No. 1784, September Term, 2003, decided July 2, 2004. Opinion by Davis, J.

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ATTORNEY DISCIPLINE

By an order of the Court of Appeals of Maryland dated June 29, 2004, the following attorney has been suspended for ninety (90) days from the further practice of law in this State:

MAURICE M. MOODY
*

The following name has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 7, 2004:

CHARLES F. WAGAMAN, JR.
*

By an order of the Court of Appeals of Maryland dated July 6, 2004, the following attorney has been suspended for six (6) months, effective immediately, from the further practice of law in this State:

SANG KUEN PARK
*

The following name has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 14, 2004:

STEVEN J. POTTER
*

By an Order of the Court of Appeals of Maryland dated July 22, 2004, the following attorney has been suspended for ninety (90) days by consent, effective immediately, from the further practice of law in this State:

DIANE LEIGH DAVISON
*

By an Order of the Court of Appeals of Maryland dated July 22m 2004, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

JOEL CHASNOFF
*

By an Order of the Court of Appeals of Maryland dated July 22, 2004, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

ALAN STEVEN WEINER
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 23, 2004:

THOMAS L. GRANGER, III
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 23, 2004:

KIMBERLY HOPE CARNOT
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective July 23, 2004:

LEONARD J. SPERLING
*

JUDICIAL APPOINTMENTS

On June 14, 2004 the Governor announced the appointment of Master **BRETT W. WILSON** to the Circuit Court for Dorchester County. Judge Wilson was sworn in on June 30, 2004 and fills the vacancy created by the retirement of the Hon. Donald F. Johnson.

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On June 14, 2004, the Governor announced the appointment of **M. KENNETH LONG** to the District Court for Washington County. Judge Long was sworn in on July 1, 2004 and fills the vacancy created by the retirement of the Hon. R. Noel Spence.

*

On June 14, 2004, the Governor announced the appointment of **TERRENCE J. McGANN** to the Circuit Court for Montgomery County. Judge McGann was sworn in on July 16, 2004 and fills the vacancy created by the retirement of the Hon. Paul A. McGuckian.

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